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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I.

WHERE CONGRESS HAS PROVIDED FOR THE INSPECTION AND LICENSING OF STEAMSHIPS, A CITY MAY NOT APPLY ITS SMOKE ORDINANCE TO SUCH STEAMSHIPS WHERE THE ORDINANCE IN EFFECT PROHIBITS THE USE OF THE EQUIPMENT ON SUCH STEAMSHIPS.

On pp. 3-5 of their brief, appellees argue that the Detroit smoke ordinance was enacted for the purpose of abating smoke, and that the federal acts, governing the inspection of steamships, were enacted for the purpose of protecting the safety of the vessels, crew, freight and passengers. The argument as to the difference in purpose is answered by *Napier v. Atlantic Coast Line Railroad*, 272 U. S. 605, 613 (1926) wherein it was said:

> "Because the standards set by the Commission must prevail, requirements of the States are precluded, however commendable or however different their purpose."

On p. 7 of their brief, appellees cite some cases which involve the doctrine that where Congress has seen fit to circumscribe its regulation and to occupy a limited field, a state is not precluded from acting in the field not occupied by Congress. That doctrine has no application here because Congress has very comprehensively provided for the inspection of vessels and their equipment and for the licensing of the vessels. Appellees, throughout their brief, ignore the fact that the Detroit ordinance does prescribe the kind of equipment which must be used upon the vessels in that it permits *only* the use of such equipment as complies with the City's ordinance.

On pp. 7 and 8 of their brief, appellees cite *Maurer v. Hamilton*, 309 U. S. 598, and *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79. Both of those cases are concerned with state laws governing the operation of vehicles on highways and those cases have no application here because states have been granted much greater latitude in the control of interstate commerce where highways are involved than in any other cases.

Railway Express v. New York, 336 U. S. 106, 111 (1949):

> "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authority, even though the local regulation materially interferes with interstate commerce."

On pp. 9-12 of their brief, appellees discuss the case of *Kelly v. Washington*, 302 U. S. 1. We believe that in certain instances appellees have misinterpreted the case. They state, on page 10 of their brief, that although Congress and the State of Washington both had enacted legislation requiring an inspection of the hulls and machinery of motor-driven tugs, the Supreme Court, in upholding the state law, reasoned that the local law was not inconsistent or incompatible with the Federal Law inasmuch as the state law related to tugs that were not embraced within the scope of the Congressional legislation. In the *Kelly* case, the Supreme Court considered three different questions: First, whether the state legislation, as applied to respondents' motor-driven tugs, was in all respects in conflict with express provisions of federal laws and regulations. On page 8, the Court found that the conclusion was inescapable that there was no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs and said:

> "It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations."

The second question considered was whether the federal statutes were to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety in the case of vessels which in this respect lies outside the federal requirements. The Court found no implied prohibition and said at p. 13:

> "It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective powers as to vessels not propelled by steam."

This sentence suggests that as to steam vessels, as to which Congress had set up elaborate regulations, such a prohibition would be implied.

The third question considered by the Supreme Court was whether the subject was one as to which uniformity of regulation is required and, hence, whether or not Congress has acted, *the state is without authority.* The Court pointed out that Congress may establish standards and designs for the equipment of vessels and prescribe rules for their operation which could not properly be left to the action of the states because the states might prescribe different standards and equipment. The Court said, p. 15:

> "A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it would treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for fed-

> eral action providing the state action does not come into conflict with federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can established a uniform rule."

The state court had held the Washington act unconstitutional and the Supreme Court reversed only to the extent that the state could inspect a vessel to determine if it was actually unsafe and unseaworthy in the primary sense.

Appellees, on p. 12 of their brief, argue that the smoke ordinance makes no attempt to prescribe the type of equipment that must be used, but continue:

> "The City, however, requires that whatever type boiler equipment used, the vessel must not emit smoke beyond a specific density."

The federal inspection laws require that the boilers and equipment be safe, and do not specify the type of equipment. The Detroit ordinance makes a different requirement as to the equipment which has been inspected and approved by the federal government. Hence, there is a direct conflict between the federal legislation and the Detroit ordinance.

A sentence from *Hill v. Florida*, 325 U. S. 538, 541 (1945) is very appropriate here. That sentence is as follows: "It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida."

On the same page appellees state:

> "Federal laws relating to the inspection and licensing of vessels engaged in coasting and interstate commerce are comprehensive * * *."

This statement is correct and leads to the conclusion that Congress, through its comprehensive action, has impliedly pre-empted the field, of inspecting and licensing vessels and their equipment, if it should be held that it did not expressly pre-empt the same.

On p. 14 of appellees' brief, they point out that in *Kelly v. Washington*, the State of Washington stated that it had no intention of enforcing any local regulation that would conflict with Federal law and appellees wish to emphasize that the record, in this case, does not show that the City of Detroit ever required any inspection or licensing of respondent's vessels. There is a distinction between stating an intention *not* to enforce invalid provisions and the mere failure to enforce certain provisions to date. Appellant, in its bill of complaint, alleged in Par. 11 that defendants (appellees here) have threatened to enforce the said ordinance (the smoke ordinance) against it and against the officers of its vessels, even where the emission of objectionable smoke cannot be prevented (R. 6). Appellees, in answering this allegation, admit that they intend to enforce the provisions of the smoke ordinance as they legally apply to appellant's vessels (R. 10). There is another explanation for appellees' failure to attempt to enforce the inspection and licensing provisions of the smoke ordinance against appellant. On October 22, 1951 the Attorney General of the State of Michigan gave an opinion to the effect that the control or abatement of smoke seems to be unavoidably intermingled with the power plant built into the ship, the fuel used and the method of firing and concluded

that a smoke ordinance could only be enforced against vessels engaged in interstate commerce where the smoke was a result of improper methods of firing or the improper use of equipment, 1951-52 *Report of Atty. Gen.*, 370. In view of this opinion, appellees made no attempt to enforce any of the provisions of the smoke ordinance as to vessels engaged in interstate commerce until late in 1955. This Opinion of the Attorney General was overruled in an Opinion dated August 6, 1956 and found in Volume II, 1956, *Report of Atty. Gen.*, 436. It is very likely that appellees had advance notice of this reversal and started the criminal proceedings, referred to in this case, in December of 1955. Appellees were thereupon enjoined from enforcing the ordinance as to appellant's vessels before they had an opportunity to attempt to enforce the other provisions of the ordinance against appellant. There is nothing in this record to bind the appellees not to enforce Secs. 2.16 or 2.17 or any other section of the smoke ordinance against appellant.

On p. 14 of their brief, appellees cite 69 Stat. 322 and draw some unwarranted conclusions from the same. The act merely provides that the Surgeon General is to prepare or recommend research programs for the study of eliminating or reducing air pollution and the Department of Health, Education and Welfare is granted authority to make grants in-aid to state and local government air pollution control agencies. Congress, to avoid any doubt, provided that it was not pre-empting the air pollution field by this act, but it is also clear that Congress was not in any way referring to or limiting the Steamship Inspection Acts.

Beginning on p. 16 of their brief, appellees argue that the City ordinance is severable. Appellees are practically agreeing with appellant's argument that Secs. 2.16 and 2.17 of the ordinance are inconflict with federal legislation,

but the argument of appellant was not limited to those two sections. It claims that Sec. 2.2A of the ordinance is also in conflict with federal legislation because that provision canont be complied with, when equipment approved by the United States Coast Guard is used. Appellant also claims that Sec. 2.20 of the ordinance is invalid as to it because that section provides that if there are three violations within any consecutive twelve month period, the Commissioner must seal the equipment unless improvements are made. Under this section vessels would be sealed even though they are using equipment approved by Congress. The penalty section or Sec. 3.2 of the ordinance provides fine and imprisonment for the use of equipment approved by Congress.

II.

IF CONGRESS HAS NOT EXPRESSLY PRE-EMPTED THE FIELD, THE DETROIT SMOKE ORDINANCE MATERIALLY AFFECTS INTERSTATE COMMERCE IN MATTERS WHERE UNIFORMITY IS NECESSARY.

On page 18 of their brief, appellees quote from *15 C. J. S.* 268 to the effect that the constitutional grant to Congress of power to regulate interstate commerce, although curtailing state power in some measure by its own force, does not forestall all state action affecting interstate commerce. The quotation from this same work, which is appropriate to our problem is *15 C. J. S.* 272:

> "As to subjects or forms of interstate commerce which are of national importance and require uniformity of regulation, state action is altogether inadmissible, even in the absence of federal action."

Appellees, on pp. 19 through 24, cite cases to support their quotation from *15 C. J. S.* 268, but the more recent cases

of *Kelly v. Washington*, 302 U. S. 1 (1937), *Morgan v. Virginia*, 328 U. S. 373 (1946), *Southern Pacific v. Arizona*, 325 U. S. 761 (1945), and *Freeman v. Hewit*, 329 U. S. 249 (1946) all seem to support the rule that where uniformity of regulation is required, state action is inadmissible whether or not Congress has acted. In this connection, it should be pointed out that appellant is arguing that the approval of the equipment on vessels requires uniform treatment, not that the control of smoke requires uniform treatment. Appellant claims that inasmuch as the control of the equipment on steamships requires uniform treatment, action, by the city which controls the equipment by preventing the use of certain equipment, is inadmissible.

If the case of *Bibb v. Navajo Freight Lines*, 359 U. S. 520 (1959), changes the rule, above contended for, to the extent of requiring the balancing of the local and national interests involved, the answer would be the same. Appellees did not attempt to rebut appellant's showing of the cost of complying with the present ordinance or its burden on interstate commerce nor did appellees in any way attempt to show what, if any, effect smoke, from vessels engaged in interstate commerce, has on the City. The City of Detroit, obviously, has many factories, thousands of apartment houses, stores, office and commercial buildings which are capable of emitting smoke. The Crapo docked at Detroit twenty-two times in 1955, for an average docking time of twenty-four hours, and the Boardman docked at Detroit twenty-five times during the same year, with an average stay of 16.2 hours (R. 19). These two vessels were charged with emitting smoke for a period of nine to ten minutes on December 12, 1955 (R. 18). There was no showing, on the part of appellees, how often this occurred, nor was there any showing whether vessels merely passing Detroit, and not docking, violated the ordinance or the

extent of their violation. It is very possible that the smoke emitted by vessels engaged in interstate commerce would be negligible when compared to the total smoke and fumes emitted in the City.

On page 28 of their brief, appellants argue that only the Detroit ordinance is before the Court. Where it is claimed that a matter requires uniform treatment, the Court may always consider the possibility of action by other states or municipalities, at least to determine whether or not uniformity of treatment is necessary. If the matter does require uniform treatment, action by a city materially burdening interstate commerce is invalid even though only one ordinance or one statute is before the Court.

At the bottom of page 30 of their brief, appellees argue that uniformity is not necessary as to the control or abatement of smoke. Appellant agrees with this, but submits that is not the point. Appellant is arguing that the control and approval of equipment and vessels, engaged in interstate commerce, requires uniform treatment. Appellant submits that navigation, in interstate commerce, would soon cease if every state and all of its subdivisions could control the vessels and their equipment by specifying that only those vessels or equipment could be used which meet their requirements.

CONCLUSION

Appellant respectfully submits that it is entitled to the relief prayed for in the conclusion of its main brief.

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